

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal No. 25 of 2005
in
Chamber Summons No.390 of 2003
in
Suit No. 3228 of 2001

Caribjet Inc. a company
incorporated under the laws of
Antigua and having one of its
offices at P.O.Box 1301,
60, Nevi's street, St.John's
Antique (West Indies) ..Appellant

vs.

Air India Limited, a company
incorporated under the provisions
of the Companies Act, 1956 and
having its head office at Air
India Building, Nariman Point,
Mumbai 400 021 ..Respondent

Mr.Virag Tulzapurkar with Mr.Doiphode and
Mr.Kabadi i/b Doifode, Phatarphekar Associates for
appellant.

Mr.Zuben Kamdin i/b M/s Mulla & Mulla & C.B.C. for
respondent.

**CORAM: A.P.SHAH &
S.J.VAZIFDAR JJ.
3rd February, 2005**

P.C.

1. This appeal is directed against the order of Khanwilkar J. dismissing a Chamber Summons for revocation of the leave granted under Clause 12 of the Letters Patent in favour of the plaintiff. The plaintiff has filed the suit for recovery of a sum of Rs.5 crores which has been paid by the plaintiff on demand of the Income Tax Authorities on account

of the tax liability of the defendant as also for recovery of Rs.96,16,74,416/- and Rs.132,65,21,397/- being the balance amount which has been demanded from the plaintiff by the Income Tax Authorities as the plaintiff is required to pay this amount on account of the tax liability of the defendant.

2. The plaintiff presented the suit before the authorised officer of this Court on 20th July, 2001 and formal application for leave under Clause 12 was moved which was granted on 8th September, 2001. Thereafter the suit came to be numbered on 13th September, 2001 and plaint was served on the defendant on 1st October, 2001. Upon service, the defendant entered appearance and filed Chamber Summons No.390 of 2003 for revocation of the leave under Clause 12 which came to be dismissed by the learned single Judge by order under appeal.

3. Mr.Tulzapurkar appearing in support of the appeal raised two submissions before us. First, it is argued, that no part of cause of action has arisen in Mumbai and, therefore, this Court has no jurisdiction and leave under Clause 12 could not have been granted. Secondly, it is contended that the plaintiff has first lodged the suit on 24th July, 2001 without obtaining prior leave under

Clause 12 of the Letters Patent; whereas leave has been granted subsequently on 8th September, 2001 which was impermissible and consequently the order is void and without jurisdiction.

4. First we proceed to answer the issue as to whether no part of cause of action has arisen in Mumbai. It is well settled that expression "cause of action" means that bundle of facts which the petitioner must prove, if traversed, to entitle him to a judgment in his favour by the Court. In Chand Kour Vs. Partab Singh, ILR (1889) 16 Cal.98, Lord Watson said:

"...the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the ground set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour."

5. In Navinchandra N. Majithia Vs. State of Maharashtra and others; (2000) 7 S.C.C.640, the Supreme Court has observed thus:

"18. In legal parlance the expression "cause of action" is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person.

19. In Stroud's Judicial Dictionary a "cause of action" is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which, if traversed, the plaintiff must prove in order to obtain judgment.

20. In "Words and Phrases" (4th Edn.) the meaning attributed to the phrase "cause of action" in common legal parlance is existence of those facts which give a party a right to judicial interference on his behalf."

6. The Supreme Court in the case of A.B.C.Laminart Pvt.Ltd. and another Vs. A.P.Agencies, Salem; (1989) 2 SCC 163 explained the term "cause of

action" as follows:

"12. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must included some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

7. In the present case, on a plain reading of the

plaint, it is obvious that the case made out by the plaintiff is that the plaintiff was required to pay the amount towards the tax dues of the defendant and having paid that amount the plaintiff was entitled to ask for reimbursement of the same having regard to the legislative scheme of the provisions of sections 159 to 163 of the Income Tax Act. The relief as claimed in the suit as filed is, therefore, on the basis that the plaintiff is entitled for reimbursement or restitution of the amount already paid by the plaintiff which otherwise was payable by the defendant in law. The amount had become payable in Mumbai and in fact has been paid in Mumbai. The defendant had his office in Mumbai till September, 1996 and the Wet Lease Agreement between the parties was in operation all over India, including Mumbai. There is also no dispute that the amount claimed from the plaintiff by the Income Tax Authority was in the capacity of assessee in default or as an agent or as a representative of the defendant under sec.163 read with sec.159 of the Income Tax Act. Mr.Tulzapurkar, however, urged that in A.B.C.Laminart's case (supra) the court has held that the cause of action must include some act done by the defendant since in absence of such act no cause of action could possibly accrue. Therefore, according to him, if the plaintiff choose to pay

tax to the Income Tax Authorities pursuant to the demand notice issued against the plaintiff the said act was unilateral to the plaintiff and shall not be of any avail in deciding the issue of jurisdiction . We are afraid that the contention of the learned Counsel is completely misplaced. The act complained of is one of failure of the defendant to discharge its liability arising under the provisions of the Income Tax Act. The plaintiff has based its claim on the express provisions under the Income Tax Act. Under sections 159 to 163 of the Income Tax Act, the plaintiff was obliged to pay the amount for and on behalf of the defendant towards the defendant's tax liability and the plaintiff is entitled to claim reimbursement or restitution thereof. The relief as claimed in the suit is on the basis that the plaintiff is entitled for reimbursement of the amount already paid by the plaintiff. We have, therefore, no hesitation in holding that the material part of the cause of action has arisen in Mumbai.

8. This takes us to the second point raised by Mr.Tulzapurkar. The submission of Mr.Tulzapurkar may be summarised thus: Clause 12 of the Letters Patent as applicable to this Court provides that this Court in exercise of its Ordinary Original

Civil Jurisdiction shall be empowered to receive, try and determine suits if the cause of action has arisen in Mumbai or in case leave of the Court shall have been first obtained in part, within the local limits of Ordinary Original Civil Jurisdiction of this Court. The words "empowered to receive" mean that the Court on the Ordinary Original Civil Jurisdiction has no jurisdiction even to receive a plaint where a part of the cause of action only shall have arisen within the local limits of its jurisdiction unless leave of the Court shall have been first obtained. Leave under clause 12 of the Letters Patent is condition precedent to the jurisdiction, so that unless the condition is fulfilled by obtaining the necessary leave to sue, the court will have no jurisdiction to entertain the suit. The lodging or filing of the plaint before the Authorised Officer of this Court tantamounts to receiving the plaint by this Court and obtaining of leave is sine qua non for lodging or filing the plaint. Mr.Tulzapurkar heavily relied upon the decision of the Division Bench of this Court in Devidatt Ramniranjandas Vs.Shriram Narayandas, 1931(34), Bom.L.R.236 holding that there can be no postfacto grant of leave under Clause 12. Mr.Tulzapurkar also referred to decisions rendered by the learned single Judge in Transasia Bio Medicals Ltd.

Vs.Revijay Clinical Laboratory & Hospital;2002(5) Bom.Cases Reporter 1 (F.I.Rebello J.); Noorjahan wd/o Altaf Ahmed and others Vs. Sadrunnisa wd/o Haji Fatehulla Khan and others; 1993(1) Bom.C.R.501 (S.M.Jhunjhunuwala J.); Rhoda Jal Mehta and others Vs.Homi Framroze Mehta and others; 1989 Mh.L.J.124 (H.Suresh J.) and Manubhai Vadilal Shah Vs.Hiralal Karsondas Bhakta and others; 2000(2) Bom.C.R.445 (T.K.Chandrashekhara Das J.) holding that leave under Clause 12 is the sine qua non for filing the plaint in this Court under circumstances set out in Clause 12 and leave has to be taken before presenting or filing the plaint.

9. In Devidatt Vs.Shriram, the suit was originally filed against four defendants and leave under Clause 12 of the Letters Patent was duly obtained. After filing of the suit it was found that defendant no.2 was dead on the date of the suit; his minor son was joined as defendant. In the meanwhile defendant no.5 was added as party. No fresh leave was obtained under Clause 12 in respect of the defendants subsequently added. The question was whether prior leave was necessary for subsequently adding the defendants. Beaumont C.J. speaking for the Bench held thus:

"...In my judgment the words of cl.12 of the

letters Patent are quite clear and make the obtaining of leave a condition precedent to the entertainment by this Court of a suit in which the cause of action arises in part outside the jurisdiction, and the condition is not one which it is competent for a Court to ignore or for the parties to waive."

10. In Devidatt's case the question to be considered by the Court was whether leave under Clause 12 was condition precedent and the same should be obtained prior to suit. The question in the present case was, however, whether the plaint as lodged on 20th July, 2001' can be said to be improper presentation in absence of leave under Clause 12 of the Letters Patent obtained from this Court. In the present case admittedly, leave under Clause 12 has been granted on 8th September, 2001. It is not in dispute that the suit came to be numbered thereafter on 13th September, 2001. The question, therefore, is whether even lodging/filing/presentation of the plaint before the Authorised Officer of this Court is impermissible. This issue directly fell for consideration in Ramgopal Chunilal Vs. Ramsarup Balevdas; 1933(36) Bom.L.R.84. The same Judges constituted the Division Bench in this case which

decided Devidatt's case on which reliance was placed by Mr. Tulzapurkar. The Chief Justice observed thus:

"....Now, as is frequently done by parties, the plaintiffs in this case started their suit at the last possible moment, and on May 25, 1932, the plaint was handed to an officer in the Prothonotary's office. In s.3 of the Indian Limitation Act it is provided that 'every suit instituted after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence'. Then, in explanation it is provided that "a suit is instituted, in ordinary cases, when the plaint is presented to the proper officer'. Under Order IV, rule 1, of the Code of Civil Procedure, it is provided that "every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. Rule 2 of that Order provides that "the Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the

order in which the complaints are admitted." Now in this case the complaint shows on its face that leave to sue is required under cl.12 of the Letters Patent. The appellant's contention is that in such a case the complaint cannot be presented except to a Judge, who is the only person who can give leave to sue under the Letters Patent, and that the presentation of the complaint to the proper officer in the Prothonotary's office does not institute the suit where leave to sue is required under cl.12. It is quite clear under our Rules and practice that the proper officer to receive the complaint is the Prothonotary, or somebody in his office to whom the duty is delegated by him. The only question is whether that rule can apply to a case to which cl.12 of the letters Patent is applicable. It is settled law that giving of leave under cl.12 is a judicial act which cannot be delegated by the Court to the Prothonotary or any other officer, and the clause provides in effect that until leave is granted the Court shall not receive, try or determine the suit. But, I think, that the argument of the appellant really involves a confusion between "presentation of the complaint" and

"admission or receipt of the suit". To my mind, the plaint, even where leave is required, is presented when it is handed over by the plaintiff or his agent to the proper officer in the Prothonotary's office. If leave is required, the plaint must be submitted to the Chamber Judge and leave obtained from him under cl.12 of the Letters Patent. When that leave is obtained the officer in the Prothonotary's office must see that the plaint is in order and admit it under Order IV, Rule 2 and he cannot admit the plaint until the leave of the Judge has been obtained. But, to my mind, the obtaining of the leave of the Judge and the admission of the plaint does not affect in any way the presentation of the plaint for the purposes of the Indian Limitation Act. That being so, I think that the decision of the learned Judge is right and this suit was instituted within the period of limitation, viz. on May 25, 1932, and the plaintiffs are entitled to judgment in their favour."

(Emphasis supplied)

11. In our opinion, the legal position has been correctly set out by P.B.Sawant J. (as he then

was) in Union Bank of India Vs.Sunpack Corporation and others; 1986 Mh.L.J.237 as follows: As per the existing practice the plaint is presented to the Prothonotary and Sr.Master of this Court who is the officer appointed for the acceptance of the plaint as per Order IX Rule 1 of the Code of Civil Procedure. Then follows the next stage mentioned in Rule 2 of the said Order, namely, the entry of the particulars of the suit in the register of suits and their seriatim numbering according to the order in which the plaints are admitted. Order V Rule 1 then states that it is only when the suit has been duly admitted that the summons is to be issued to the defendant or defendants as the case may be. This is also clear from the provisions of Order VII Rule 9. The Code itself, therefore, envisages two stages - first, of the presentation of the plaint, and the next, of the admission of the plaint. The suit is not admitted to the register of suits and number is given to it, merely on the presentation of the plaint. After the presentation, the plaint is scrutinized. If there are any defects in the same, the plaintiff is required to remove them. The removal of defects is a matter of procedure. It is only after the defects are removed that it becomes eligible for an entry and a number, in the register of suits. One of the defects can be the absence of leave of the

Court to institute the suit where it is necessary, including leave under Clause 12 of the Letters Patent. So long, therefore, as the plaint is not admitted and entered in the register of suits, all defects including that of the absence of leave under the said clause, can be removed without returning the plaint. It was pointed out that it is the confusion between the two stages, namely, presentation of the plaint and of its admission to the register of suits after the removal of the defects, if any, which is responsible for the faulty procedure adopted by the office. Sawant J. directed the office not to return the plaint for want of leave under Clause 12 of the Letters Patent but only require the plaintiff to obtain the leave and admit it to the register when leave is obtained. The office followed and implemented the directions of Sawant J.. However, it appears that after the decision of Suresh J. in Rhoda Mehta's case (supra) which has taken a contrary view, the office again changed the practice. Incidentally, neither in Rhoda Mehta's case nor in the other decisions rendered by the learned single Judges the decision of Division Bench in Ramgopal Chunilal's case was noted. Those decisions are clearly per incuriam. We are informed that following an unreported decision of Kochar J. dated 11th March, 1977 in Nat Steel Equipment Pvt.Ltd. Vs.

Bangalore Heart Hospital and Research Centre (Summary Suit (Ld) No.213 of 1999) the old practice of not returning the plaint for want of leave has been restored by the office. In the circumstances, the fact that the suit was accepted by the authorised officer of this Court prior to obtaining leave under Clause 12 will make no difference in as much as it is only upon numbering of the suit the suit can be said to have been "accepted" by this Court. It is, therefore, not possible to accept the submission that the plaint as lodged on 20th July, 2001 was improper presentation. In the present case, admittedly, leave under Clause 12 was granted on 8th September, 2001 and only thereafter the suit came to be numbered on 13th September, 2001. There is thus no reason to interfere with the order granting leave under Clause 12. Appeal is accordingly dismissed.